UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES, et al.,	:	Civil Action No.:
	:	1:23-cv-108
Plaintiffs,	:	
versus	:	Friday, June 7, 2024
	:	Alexandria, Virginia
GOOGLE LLC,	:	
	:	Pages 1-40
Defendant.	:	

The above-entitled motions hearing was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 10:06 a.m.

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P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action Number 1:23-cv-108, United States of America, et al. versus Google LLC.

Will counsel please note their appearance for the record, first for the plaintiff.

MR. MENE: Good morning, Your Honor. Gerard Mene with the U.S. Attorney's Office.

THE COURT: Good morning.

MS. WOOD: Good morning, Your Honor. Julia Wood from the Department of Justice for the plaintiffs.

THE COURT: Good morning, Ms. Wood.

MS. WOOD: I'll introduce my colleagues as well. Matthew Huppert, Katherine Clemons and Aaron Teitelbaum are here as well, all for the Department of Justice.

MR. HARRISON: Good morning, Your Honor. Jonathan Harrison from the Virginia Attorney Generals Office.

THE COURT: We always forget you, but you're not forgotten. Okay.

MR. HARRISON: I'm here on behalf of the state plaintiffs.

MS. DUNN: Good morning, Your Honor. Karen Dunn from Paul, Weiss on behalf of Google. With me here is Amy Mauser, also from Paul, Weiss; Jeannie Rhee, Bill Isaacson, and I understand that Mr. Reilly is with Judge Hilton.

THE COURT: That's all right. I knew about it. That's not a problem.

Who's going to be arguing on behalf of Google?

MS. DUNN: I will, Your Honor.

THE COURT: All right. Well, as you know, we sort of had a preview of this issue last week. Since then, there's been a chance to further consider it and brief it.

But what is before the Court today is the defendant's motion to strike Count 5, which is the only count that -- oh, Mr. Reilly is here. Judge Hilton is so fast, I knew you wouldn't be late.

MR. REILLY: Yes. Thank you, Your Honor.

THE COURT: Is to strike Count 5, because the damages that could possibly be obtained at trial have been tendered to the government, and, therefore, the issue in Count 5 is now moot. And with Count 5 out of the case, there is no longer a basis upon which there should be a jury trial, and that's essentially the issue we have before us today.

It's my understanding -- and I guess, Ms. Wood, you're going to be speaking for the plaintiff?

MS. WOOD: Yes, Your Honor.

THE COURT: All right. It's my understanding that if you come to an agreement or if we resolve the issue as to the amount of damages that would possibly be obtainable

under Count 5, if that amount has, in fact, been given or tendered to you, that that would satisfy the damage issue for Count 5.

MS. WOOD: Your Honor, I would just clarify that we do not view this to be, in any way, shape or form, a settlement agreement. We do believe under the case law, that if that amount is satisfied to the extent that a jury could potentially award up to that amount, then that situation would be moot, and the damages claim would be dismissed. We just have certain Tunney Act obligations when we are engaged in settlement. We would just want to clarify for the record, this is not a settlement posture we find ourselves in.

THE COURT: I think that's quite clear. You're fighting it tooth and nail. But it's not a settlement.

MS. WOOD: Yes, Your Honor.

THE COURT: But you would also agree that if there is no longer a claim for damages in the litigation, that there is no longer a basis for a jury, because all the other relief that you can possibly get under Counts 1 through 4 is injunctive relief, which goes to the equitable power of the Court.

MS. WOOD: Yes, Your Honor. Absolutely.

THE COURT: All right. So we're clear about the parameters.

So the only real issue that we need to talk about today then is this issue as to whether or not the check, the cashier's check -- which I think is significant if you look at the case law. It's not an offer; it's an absolute here's the money. If they could have given you a wheelbarrow of cash, it would be the same thing. You've got the money in hand, and so the only real question is, is that dollar amount, does that represent what could possibly have been obtained if the case had gone to trial.

And on this one, I think the government has a very difficult job, given the record, as we said last time. And I do want to commend Ms. Rhee in particular, because you were not prepared to argue the issue and you came in and did a fine job. And, Ms. Wood, you also were not prepared. I mean, that wasn't on the docket, and you did an excellent job as well.

But I've spent time going over your expert reports, and I had even my clerk do a -- you know, with the computer now you can do a word check. I don't see anything -- in either Dr. Simcoe's report or any of the other two experts who address damages, I don't see any actual discussion of the 5 percent take rate.

It's included in Simcoe's charts, and that's all it is. It's there. And he has two charts. He has the one we talked about last time, which is the chart that shows

the -- there are ten ad tech entities on that chart, Google and nine others. And Google and eight of those nine, as I said last time -- and I looked at the chart again, and it's consistent with that -- their take rates are all within a relatively close range.

And then there's one outlier who is way below that. Not way below, it comes in at about 8.2, 8.3. It's hard to read on the chart because it's not that clearly delineated. And there was one year over that, I think it's a ten-year time span, in which the take rate went below 5 percent. So I called that entity last time an outlier, and I still do.

But then we looked further at the Simcoe report, and if you look at that, there's a second chart where he draws sort of that line. And he, again, talks about what those numbers essentially mean, and he also says that the -- says nothing about the 5 percent. There's no 5 percent discussion in his report. So that's the first concern I have.

And the second -- well, I have several.

The second problem I think you have is that if you look at Ms. Lim's report, she doesn't use the 5 percent; her range is between the 10 percent and the 16.9 as the take rate. And the original damages expert who, by the way, left the case. Was there a reason why he left the case?

MS. WOOD: For purely personal reasons, Your Honor.

THE COURT: Purely personal reasons. All right. But she fully adopted his report.

Now, I've read his report, and in his report, you know, he says that he based his calculations -- and his chart goes from the 16.2 percent up. I think that was the lowest number he had. I'm sorry, 10 percent, 16.2, 16.9. And he said that that chart, which is what he used to do the damage calculation, was based in part on Simcoe. He does not discuss the 5 percent at all.

So you've got your -- all your damage experts have gone with the range of numbers starting from the 10 percent up to the 16.9. The 10 percent is the highest number, that represents the biggest damage amount for the plaintiff. And the cashier's check, which Google has delivered to you all, is for the most generous number in that respect.

So I don't see any evidence at all, other than these three, you know, little emails that float around that are interesting to read, but they're just talking about possible. Yeah. It's possible. Maybe we should consider going down to a certain lower percent take rate, but that's not the kind of evidence that supports an actual damage claim.

And then the last problem you've got -- and we

talked about this last week -- is that in your opposition to the motion for summary judgment -- and I think this is very interesting -- is that the defendant's motion for summary judgment was filed, I think it was in April, one day -- and in that, they listed I think 70 or 80 -- or quite a few statements of uncontested facts, which is standard practice in civil cases. Every summary judgment motion should have a separate section that lists those facts that the party believes are uncontested. And then the way the law works is if the opposing side does not object to a proposed, you know, uncontested fact, that fact is deemed admitted. And we talked about this a bit last week as well.

And so the problem here is, although you all objected to over 60 of those uncontested facts -- so clearly, you know, the government and the plaintiffs were paying careful attention to the uncontested facts, and the majority of them -- or a significant number of them you actually were contesting or adding some modification to them, you fully accepted the one that addresses the damages range.

And so on that kind of a record, it's extremely problematic that you could come in and argue -- that you can come in and argue that somehow you're entitled to something more than the 10 percent.

So I'm looking at you because, Ms. Wood, you've

got the heavy lift on this one.

MS. WOOD: Thank you, Your Honor.

Let me respond. I think the fundamental issue that we would like to point out is what Google has done here is an extraordinary step. What Google seeks to do is, unilaterally, without consent, and frankly without forewarning, moot a damages claim and take away the United States' right to have its day in court to put on damages.

THE COURT: Well --

MS. WOOD: And the reason --

THE COURT: You're getting your day in court. And the real issue -- look, let's be honest about it. The real issue, and the real issue the government has in this case, is not recovering damages. Because even if a different take rate were used, the amount of actual monetary injury to the government agencies is, by federal standards, somewhat de minimis. Your attorney's fees are dwarfing the amount.

So the real issue in this case is the injunctive relief that you're seeking, it's to stop what you maintain is the anti-competitive behavior. That's really what this case is about.

MS. WOOD: Your Honor, I don't disagree at all that the injunctive relief is the most important, that vindicating the rights of the United States, but that is equally important.

The only reason I raise the unusual posture is there is a different legal standard that applies in the context of unilateral mootness. And so we believe that a jury could find -- without expert assistance, a jury need not rely on damages numbers offered by experts to reach their own conclusion about an appropriate but-for take rate.

THE COURT: Well, that may be the case, but it's your obligation as an attorney to have clearly articulated so that both -- so that the other side knows what the damage range is that they're facing. And the problem here is -- I want to just ask another question because it's not clear from the record.

Judge Anderson had to order you to respond to Google's request for a damage calculation. Remember they asked that? And he ordered that you file an interrogatory answer. And that answer was filed, as I recall, before the expert reports were produced.

MS. WOOD: Yes, Your Honor.

THE COURT: Did you ever amend that answer?

MS. WOOD: The answer, once we filed the expert reports, I don't believe we amended it further after that. But I do believe, as the record makes clear, that in that damages calculation, we included a but-for take rate as low as 2 percent. We made clear that if you're talking about the full breadth of damages that could potentially result in

a jury verdict, that a but-for take rate as low as 2 percent could apply.

Furthermore, both Ms. Lim and Professor Simcoe make very clear in their expert reports that they are not opining on what the jury should conclude is the appropriate but-for take rate. They're both very clear in that regard. Professor Simcoe makes the point over and over that his estimations of a but-for take rate are highly conservative for the reasons we discussed last week. Because to look at a market that has been dominated by a monopolist for over a decade and look at what existing take rates are in that market is highly conservative to the point that it may even not be that probative.

What we think is probative and what a jury could conclude is probative is defendant's own employees talking about if there was not the Google ads demand tied to AdX, they would not be able to charge higher than a 5 percent but-for take rate.

We believe that even assuming defendant -- plaintiffs' experts, Simcoe and Lim, offered 10 percent, 16 percent and other figures, a jury has the prerogative to conclude that 5 percent is the take rate that would have applied in the absence of Google's anticompetitive conduct. The fact that Professor Simcoe attempted to perform empirical analysis that bakes into it the monopoly that's

been existing in the market for over a decade just shows the range.

And, again, with respect to Statement of Undisputed Fact 85, that statement was not relevant to the summary judgment motion that was filed. It is not deemed admitted for all purposes without this Court, in its discretion, pursuant to Rule 56(g), making that determination.

We think the Court should decline to make that determination because, in that very same brief, we made very clear that the range of but-for take rates was between 5 and 15 percent. Yes, there's evidence of 2, but we think the range of 5 to 15 percent is a reasonable range, and we made that argument in the very same brief.

THE COURT: Well, how could you say that choosing 5 as the bottom number is reasonable when you've pointed to evidence of 1 or 2 percent? I mean, it's inconsistent.

MS. WOOD: Well, Your Honor, I think we are attempting to walk a difficult line here. We've been put in a position where we have unconsensually having our damages claim removed. In that unique posture -- this is not a settlement agreement, this is not what anybody in the courtroom thinks is likely that the jury will ultimately conclude. The question before the Court is what could a jury, based on this evidence, potentially conclude. We

don't think there's any debate that, based on this evidence, a jury could potentially conclude that 5 percent is an appropriate but-for take rate. We think the evidence is clear about that.

Whether we could have additionally argued in our discretion to say that a jury could conclude 2 percent, we're not -- we have the discretion to say what we think the case law would support. We believe the case law would support a but-for take rate at 5 percent given the evidence that we've put forward.

And I want to just emphasize, Your Honor, yes, the brief does cite a few emails. That's the nature of the summary judgment brief, because it's only designed not to marshal every piece of evidence one has on a point; it's designed to set forth a disputed issue of fact.

We think, read in context, our summary judgment brief makes clear that we are disputing the but-for take rate, and that we are disputing Google's assessment that 20 percent was an appropriate take rate, and we are saying that we believe the appropriate take rate is between 5 and 15 percent. They read that in the brief, they saw that in the brief, and so I don't think it's fair -- and they knew that during discovery we were arguing potentially a 2 percent.

So it's not as if they're -- you know, we're not

on notice of this potential argument. We fundamentally believe the jury, without expert assistance, can conclude an appropriate but-for take rate based on the testimony of fact witnesses, not just experts. And there's no question we would have fact witnesses and documents both that support the 5 percent take rate, and because of that, we believe that is a potential damage that could be recovered. We're not saying it's likely, we're not even saying that's what we necessarily would have asked.

Could a jury possibly determine a 5 percent but-for take rate? We believe the evidence shows that they could, and given the unusual nature of Google trying to take away the United States' right to put on a damages case on behalf of these FAAs, that they should have to meet that higher burden.

Also, with respect to the trivialization of the amount, I assure you, this amount is not trivial to the agencies involved. It may be trivial relative to Google's wealth, but these agencies work hard every day on behalf of the American people, and the difference between $2 million and $3 million or more is material to these agencies and their work. So I don't want to leave the Court with the impression that this amount is immaterial to the agencies.

THE COURT: All right. Let me ask you this: These experts, were they deposed?

MS. WOOD: Yes, they were.

THE COURT: So Simcoe was deposed?

MS. WOOD: Yes.

THE COURT: And Lim or was her predecessor deposed?

MS. WOOD: Lim was deposed. And I would add that when they were deposed, they indicated that they were not saying what the appropriate but-for take rate should be. They did not say that. In fact, they were asked -- I know at least Lim was asked that question directly. And they were not asked that. It was clear that we were leaving room to argue at trial what the appropriate but-for take rate was based on a multitude of factors, expert testimony, fact testimony and documents.

THE COURT: Then why didn't you object to Uncontested Fact 85?

MS. WOOD: Because Uncontested Fact 85 was phrased as what calculations the experts had done.

Again, the fact that Google, the night before, had done this very unusual thing and served us at 7 p.m. with a process server with a check and a motion to dismiss the damages claim, we were not thinking of the motion to dismiss the damages claim when we were rebutting facts in the summary judgment brief. In fact, there's a footnote in our summary judgment brief opposition that says: We note that

Google has filed this motion to dismiss. We are not addressing that here, and we are continuing, you know, to file the summary judgment brief that we've been working on for the last two weeks. We didn't rewrite the whole brief to take into account of the last-minute filing they had served hours before.

THE COURT: But, you know, you could have tried, at least -- I don't know if I would have accepted it or not. You could have filed a motion to amend your position on the uncontested facts.

Again, 85 says: "Plaintiffs claim less than $1 million in damages -- by their calculations, as little as 164,189, or, at most, 745,152 (before trebling and pre-judgment interest) -- on behalf of eight federal advertising agencies who allegedly suffered injury between January 2019 and January of 2023 when advertising agencies purchased 'open-web display ads' on the FAA's behalf." That's what was given to you all as an uncontested fact.

MS. WOOD: And, Your Honor, we did dispute that partially. I hope Your Honor is aware of that. We made clear -- if you look at the summary judgment brief, we made clear that we were disputing the phrase "at most." We absolutely did dispute that phrase. And so if you remove that phrase, what's left is: "Plaintiffs claim as little as $1 million in damages." Their check didn't pay us

$1 million in damages. Their check was based on $745,000 of damages.

So even if Your Honor were to accept that SUF 85 prevents us from arguing a 5 percent but-for take rate, the check they have already tendered is not for the amount of SUF 85. It is not for $1 million plus pre-judgment interest and trebling; it is for an amount less than that. So, at the very least, they should be required to tender a check of $999,999, Your Honor.

THE COURT: All right. Thank you, Ms. Wood.

MS. WOOD: Thank you.

THE COURT: Ms. Dunn.

MS. DUNN: Thank you, Your Honor.

THE COURT: Do you want to start with the first issue -- the last issue first, that is the uncontested facts?

MS. DUNN: Yes.

THE COURT: All right.

MS. DUNN: I would be glad to, Your Honor.

So, the first thing is, we believe it's really important to do this right, in the right way. It's obviously not something that happens every day, so we're trying to do this really by the rules and by the book.

So starting with SUF 85. As Your Honor said, the day after we filed our mootness motion, the government

confirmed that they did not dispute SUF 85. And this does not say what my friend on the other side just said; it says what the Court said, which is what plaintiffs claim less than a million dollars in damages, by their calculations -- which, by the way, we'll get to the legal standard, but that's what is important. By their calculations, as little as 164,189, or, at most, 745,152 before trebling and pre-judgment interest. So as the Court is aware, the check that we tendered -- the certified check that we tendered, is for 745,152 trebled with pre-judgment interest.

So, the first thing I'll say is that in our last hearing, the Court said the government will be held to its position. And what the legal standard is, where counsel started, is to say that the legal standard is whatever plaintiffs could potentially recover, including a number that -- admittedly, the 5 percent that they plucked out. So that's not the standard in the Fourth Circuit.

Simmons v. United Mortgage says: "Mootness is measured by what relief the plaintiff sought to obtain through the claim." And that makes sense because the issue is mootness. Is there a claim? Is there a jurisdictional basis for the Court? And so that's why the courts don't look at what could a jury possibly do, because a jury could possibly, as we all know, do anything at all; it is looked at as what the plaintiffs claim, because the question is, is

there a case in controversy.

Now, I will -- starting with SUF 85, can walk through why this is the plaintiffs' claim.

Now, as the Court I think alluded to in the last hearing, this is a binding judicial admission. There is no legal authority to say that this admission is just for the purpose of a summary judgment brief.

And as to this idea that somehow this was actually disputed because the plaintiffs didn't like the language "as little as" or "at most," that's Footnote 1 in their opposition to the summary judgment motion. And what they say is they dispute the vague subjective and self-serving terminology included in many of the statement of undisputed fact, and they include in that list things like innovation, and popular, because they don't like how we phrased it because it seems self-serving to them. So when we say "as little as," that's saying this number is little. Or when we say "at most" this other number, we're saying that number still isn't so high, and the Court has called it de minimis.

And so even if they're objecting to the self-servingness there, they are not objecting to the amounts, and they're not objecting to the idea that plaintiffs claim less than a million dollars.

And I think at this point, it's important to emphasize for the Court that the number that the government

is urging the Court to accept is a computation not disclosed in discovery; disclosed to us on the night of June 1st, a few days ago, Saturday, Saturday night. They sent us, for the first time, the computation that goes along with this 5 percent idea. And that's -- that is truly extraordinary. It would be extraordinary on its own, but it is especially extraordinary in light of the fact that Rule 26 says: During discovery, your computation -- uses the word computation -- has to be disclosed, and nine months ago, Judge Anderson said to the government that they had to do that. And so Judge Anderson also said they can't wait even for the expert report to disclose that, much less wait until nine months later when we're in the middle of summary judgment briefings.

THE COURT: Of course what they did disclose when they finally sent you the answer was a number range which is much higher than what we're talking about now.

MS. DUNN: Yes, Your Honor. Exactly.

THE COURT: That's why I asked the question whether there had been any revision of their answer. And, quite frankly, that's another basic problem in this case.

All civil cases -- I mean, Google's a big case, but it's no different than any other civil case. Plaintiffs are required to amend their discovery responses when new evidence is developed. And that's why I was rather

surprised. Again, you don't necessarily file your discovery responses with the Court unless there's a dispute, but that's why I asked the question whether the government's response on the damage numbers was ever amended, and apparently, according to Ms. Wood, it was not. So that should have been done.

MS. DUNN: We agree, Your Honor.

Also surprising to us was that on May 31st after the Court hearing that I apologize for not being present for, but my colleague, ably, was able to handle. On May 31st, they said they couldn't even give us the computation then because the key person was unavailable.

So this computation that should have been amended, that Judge Anderson said nine months ago needed to be turned over that wasn't in the expert reports, was not even available or accessible or replicable by DOJ on May 31st, and we had to wait until the next day.

Now, that -- so, so far, we've talked about holding them to their admission in the summary judgment opposition, a binding judicial admission, and we've talked about holding them to their disclosure obligations under Rule 26 and to Judge Anderson's admonitions.

The third problem is that there is -- as the Court has already alluded to, there is no support for this new number, the 5 percent, in anything, including the documents,

but I would like to start, if it pleases Your Honor, with the expert reports.

Now, the first thing I'll say is that DOJ has insisted, many, many times, including before Judge Anderson and in their own briefs, that expert computation is necessary to come up with the total. Their own words before Judge Anderson last year were that complex expert calculations are needed in order to come up with a total, and the only way to calculate how much those were, how much those prices were overcharged, is through economic modeling. In their opposition to the mooting motion on page 4 they say it's required. So that's pretty recent.

If it pleases the Court, Your Honor, I would like to show the Court the actual figures from the expert reports, because you have to go from figure this to footnote that --

THE COURT: We've looked at that.

MS. DUNN: -- is that okay?

THE COURT: I've got them pretty much in mind.

By the way, you raise an issue that we had kicked around in chambers, and that is, all right, so we let this case go to the jury on the government's theory of 2 percent, and as you're pointing out, there's no evidence as to what that 2 percent would result in. And we were joking about, do we give a calculator to the jury, and do they have to sit

there and do the mathematics themselves?

MS. DUNN: Well --

THE COURT: So are you saying that within the -- as I recall, there's nothing in any of the expert disclosures that calculates what would a 2 percent take rate be.

MS. DUNN: Your Honor, I do think the slides would help, but I can try to start without them.

THE COURT: All right.

MS. DUNN: Figure 19 in the Lim report, it's entitled Summary of Damages to FAAs.

THE COURT: Right.

MS. DUNN: You're familiar with that undoubtedly.

The 16.6 comes from Simcoe. The 16.2 comes from Simcoe. Those are the but-for take rates that he analyzed. The 10 percent was an instruction from the DOJ. Okay. So the 10 percent is not in Simcoe. And actually in deposition, Simcoe says -- he disavows that he's advancing the 10 percent. Okay. But, nonetheless, Lim has instructed use 10 percent, 16.2 and 16.6. She does that.

In her Summary of Damages chart, she has AdX overcharge from the exchange, and then she has a platform fee overcharge. She adds these two together, and that's where she and we and the government, at a certain point, got 164,189 to 745,152. Okay. Then the government says, no,

that summary of damages from Lim, don't look at that; look at Figure 38 in Appendix D in Lim instead.

Now, Figure 38 in Appendix D is a sensitivity analysis; it is not a but-for take rate analysis. And what a sensitivity analysis does, as the Court, I'm sure, is aware, it's designed to change a variable so that you see how sensitive the economic model is so that if it's going crazy, that's a bad model. I'll put aside the fact that this model seems too sensitive, but that's a different problem.

Lim, in Figure 38, then puts red boxes. The red boxes she puts around the percentages that she's drawn from Simcoe, and around the 10 percent that the government has instructed. So everything in the Simcoe Figure 22 is red-boxed in Lim 38. 5 percent, no red box. Okay. Then the only place in Lim where she mentions Figure 38, that the government now wants to hang its hat on vicariously, is Footnote 53.

Now, Footnote 53, she expressly says that she got these numbers from Simcoe 22 in Appendix D. Okay. So that requires us to go to, first, Simcoe 22, which has, as you'll see if you go back and look at it, the 16.6, the 16.2. Those are the ones he advances. And then some that start with 15.7, 15.6, where he's segmenting out just large exchanges. He doesn't, in the end, advance that, but he did

those calculations, and all those have the red boxes. Again, no 5 percent anywhere to be found.

Now, Figure 38 also doesn't include, notably, and another -- yet another reason it can't be a damages analysis, it doesn't include the platform fee, which is part of the computation that Lim explains in Figure 19 when she adds the AdX overcharge, plus the platform fee, to get her 100,000 to -- 100 to 700 range. So the platform fee is a big deal because it's one component of her damages analysis. Nowhere in Figure 38; nowhere in Simcoe.

Also nowhere in Appendix D. Appendix D shows how Lim calculated these things. She has Figure 37, which is dedicated to platform fee overcharge; it does not include the 5 percent. So the platform fee overcharge -- which is part of the damages calculations that Lim does -- there's nowhere in Lim's report where she's doing a 5 percent calculation. She does only the 16.6, the 16.2 and the 10 percent that the government instructed. So that's a problem.

Then, resorting as it must to paragraph 77 of the Lim report, the government says, no, you can get the platform fee overcharge, and, actually, this whole calculation, you can get it from paragraph 77 in the Lim report.

I could read to the Court paragraph 77 in the Lim

report. It gives instructions; it does not give any kind of formula. And, actually, if you followed the instructions in the Lim report at paragraph 77 to try to calculate the damages and the platform fee overcharge, you wouldn't come up with the number that we were given on Saturday night, June 1st. Okay.

So the government has said, oh, you should be able to calculate this number using Lim 77, and they also say in their brief at page 2, the surreply brief, that the jury could calculate it just looking at Lim 77.

Well, calculator or not, this number that you calculate with Lim 77 doesn't match what the DOJ calculated and gave to us as their computation that they're saying is the 5 percent. So they can't do it. We couldn't do it. We needed expert help to even figure out 77. And the jury is assuredly not going to be able to do that. So that's the expert report. That brings us to the documents.

I want to first say that never in the history of antitrust cases has a but-for world been defined by a small collection of documents that don't purport to define a but-for world. It may never have been just documents anyway. Areeda and Hovenkamp say you need experts; the DOJ, this whole way along, said you need experts; there are various Courts of Appeal in the United States that have said you always need an expert. The Third Circuit has found

that; other appellate courts have alluded to that.

But, here, you can't -- you don't even have to get to this question, because not a single one of these documents say they're calculating a 5 percent but-for rev share. They don't -- at one point in one of these documents that the government points to, somebody says, if we did 5 percent, how could we be competitive?

So these documents don't support a 5 percent, they don't support a 10 percent, they certainly don't do any of these calculations that we were required to receive during discovery and through the experts. And so what is going on here is -- I mean, the whole thing is extremely strange, I'll be honest. I don't really understand it. And the idea that the expert report somehow baked in this calculation that actually their main damages expert disclaimed twice that, they say he baked in 5 percent. Well, no, he disclaimed even 10 percent. So that doesn't make sense. Reliance on the documents is legally wrong but also factually wrong.

And I want in particular, Your Honor -- and I appreciate the Court's indulgence of the time -- is to say -- I think it's really important that I respond to this attack that the damages number might not be a lot of money.

So this damages number is less money than the government has spent on expert fees alone, and that includes

the expert fees that they probably spent last week getting their experts to run new calculations to urge this Court and us to accept.

And so nobody is saying this is such a trivial amount of money in certain contexts. What we're saying is, if what is really the concern is the taxpayer dollar, then paying experts many millions of dollars more than you're claiming in damages, and fighting tooth and nail to protect that, spending even more money, and even more money to litigate it of the taxpayer dollars, it's not a consistent argument.

So I appreciate the Court allowing us to make this argument, and I'm happy to answer any question.

THE COURT: All right. Ms. Wood, I want you to respond to something. I'm intrigued.

It is correct that it was the Department of Justice that proposed to Ms. Lim that she use a 10 percent take rate?

MS. WOOD: Your Honor, yes. And let me explain, because I think that goes to the fundamental heart of the issue here.

The government has always maintained that the expert analysis that was done by Professor Simcoe, the empirical analysis, was so conservative that it likely grossly understated the harm to the market. And for that

reason, and because Google's own documents and Google's own employees talk about what they could charge in a truly competitive market, and that they would be lucky to get 5 percent in that competitive market, the government has always maintained the flexibility to argue at trial a but-for take rate lower than that.

THE COURT: Let me stop you.

So then why not say to Ms. Lim, give us a 10 percent take rate, and give us a calculation on a 5 percent take rate, and give us a calculation on a 2 percent.

MS. WOOD: So, Your Honor, Figure 38, that is exactly what Figure 38 does. And Figure 38 has the number, doesn't require a calculator, literally -- the jury just needs to look at this one page.

And, again, we're operating in a bit of fiction here. We have some agency in this. We, in closing arguments, can tie together documents, tie together various figures, and show the jury step by step how they get to the numbers. We have the ability to put on the exhibit list the backup materials that show what the take rate would be at 5 percent, 1 percent, 15 percent or whatever.

We were maintaining optionality as to what the ultimate evidence would show, and that is totally appropriate. As long as we give them disclosure of the

lower and upper bounds -- which we unequivocally did -- and as long as we made clear that there was not one specific but-for take rate that the government was arguing. The government was prepared to put on evidence about take rates lower than what Professor Simcoe arrived at in his report, because, again, the take rates he arrived at in his report are necessarily baking in the decades worth of monopoly behavior. And so they're simply so conservative that they may not even be all that probative of what the true harm is. That's why Exhibit 38 exists. That's why it's in there.

Yes, are these red boxes checked? Yes. But 5 percent is right there. I know Your Honor can't see it, but 5 percent is right there. All they have to do is say 5 percent, and the advertisers' portion of that is 19.3, and you get to 1079.

Is the calculation to arrive at the platform overcharge fee more complicated? Yes. They can't get it from one chart, I can see that, that's $100,000. We could make the choice at trial to not even bother with that and just tell the jury if you think 5 percent is the right number, look at this chart, here's where it is in the chart, let me tell you exactly how to find it, it's right here under 5, right across here at 19.3, and this is the number you should award. We have that flexibility in putting on the evidence and arguing to the jury. So what they're

trying to do is front-load all of that and bind us to things that were not properly before the Court at the summary judgment phase.

And frankly, you know, the expert fees that have been expended in this case are enormous, and that is because the conduct of this defendant has been widespread and egregious. But those expert fees will serve the Court in a bench trial as well, because the same fundamental harm that has been suffered by the entire industry, not just these FAAs, is going to relate to that same expert analysis.

We can talk, and we talked a little bit last week about what of the damages experts would still remain even if this case proceeds with a bench trial, and that's because those expert analyses are still relevant. Not with respect to the FAA damages, but with respect to looking at things like but-for take rates and defendant's profitability and the like.

So I would just end, Your Honor, I understand Your Honor's skepticism. I would just offer that we don't believe that we need expert testimony to argue to the jury facts that are in evidence that support a different but-for take rate. We believe that given the unique circumstances where they are unilaterally and unconsensually taking away our right to put on evidence about the FAA's harm, that they should have to pay the full extent that we would be prepared

to argue at the jury trial.

If Your Honor concludes that, for whatever reason, we are precluded from arguing 5 percent at a jury trial, I think that's a different issue, but I don't believe the response that we gave to SUF 85 would preclude us from arguing a but-for take rate lower than that at trial.

THE COURT: All right. Thank you.

I'm going to give you an oral ruling now to put you at rest, and then you'll get a more detailed explanation in the not-too-distant future.

I am going to grant the defendant's motion, because, again, I think a fair reading of the expert reports does not support the argument that there is a 5 percent take rate at issue in this case. And to ask a jury to basically -- it would completely undermine the fact that a jury is supposed to have, you know, sufficient, appropriate evidence upon which to make a decision. They're not supposed to speculate or render a decision based on speculation. Without the assistance of expert evidence in this area, that's exactly what the government is asking a jury to do, and that would not be appropriate.

There are multiple reasons -- some of which I preliminarily outlined for you today -- why I'm satisfied, in this case, that the cashier's check that was tendered to the government fully satisfies any damage claim that they

could possibly have obtained in this litigation based upon what the expert reports revealed, as well as the government's admission, which I still think is essentially an admission as to 85, the statement of uncontested facts.

So, as a result of that, I am striking the request for jury, and that does change, I think significantly, some of the tenor in the *Daubert* motions.

So here is what I'm planning to do. I'm going to leave some *Daubert* -- I'm going to leave the *Daubert* motions on for next Friday. I'm going to continue the summary judgment argument to the following Friday, which you already had on your calendars, because we had that date as a Google date anyway. And I want some time, number one, to be able to get this opinion out, to digest the *Daubert* motions.

I will say right now, because it's going to be a bench trial, much of the argument that comes out in the *Daubert* motions is, well, you know, we don't want to confuse the jury, blah-blah-blah. Well, you don't have to worry; you can confuse me, but not the jury. All right.

So, in other words, a lot of the argument about *Daubert* may become almost moot at this point. I'm going to be the trier of fact. I'm able to get through and parse expert reports.

There's no dispute -- with one exception, Mr. Ferrante. There's no dispute, in my view, as to the

expert qualifications of any of the experts at issue; correct? Nobody's disputing their qualifications?

MS. WOOD: That's correct, Your Honor.

MS. DUNN: Yes, Your Honor.

THE COURT: All right. So the only one over which there is potentially a legitimate argument is Ferrante, in my view. I'm not convinced that he would be a genuinely qualified expert given the fact that he hasn't worked for the FBI since 2011. It's also a strange area. But I have an open mind. I'm going to spend some time looking at him.

As to the other four, it might make sense to think about pulling back significantly. But at least your oral arguments will be much less because you don't have to worry about the jury and those aspects of those reports that might be confusing.

I've always had some qualms about *Daubert* because I'm an old-time trial lawyer and trial judge, and that's what trials are about. You put a witness on the stand, and you see whether the witness's testimony is credible or not credible. And with experts they either have -- you know, they've used an appropriate methodology, they've got the right data upon which they base their conclusion and the conclusion makes sense. I mean, that's what judges do. And so I -- you know, and having done some preliminary look at these *Daubert* motions, I'm not convinced there's really much

left to be argued except for the Ferrante motion. But I'll leave all five on the docket for next Friday. All right. That's what we will be arguing.

And then summary judgment we'll argue the following week, because that also gives you a little bit of a chance to re-evaluate how you want to spend your oral time on those motions because things may have changed from both this week and from next week. All right.

MS. WOOD: Your Honor, may I ask one question?

THE COURT: Yes, Ms. Wood. Yeah.

MS. WOOD: Under the current schedule, our deadline to file exhibit lists, witness lists and depo designations is June 28th, which was two weeks after the oral argument on summary judgment.

I would just request that there be a commensurate adjustment to that so that we're not filing all of those within seven days of the oral argument on summary judgment, Your Honor.

THE COURT: All discovery is over in this case; right? That has closed?

MS. WOOD: Yes, Your Honor.

THE COURT: So all we're doing between now and September is streamlining the issues for trial. I see no reason why you all -- sit down together, work out a proposed revised schedule for those filings; all right?

MS. WOOD: I appreciate that, Your Honor.

THE COURT: All right. In terms of motions, I would think after we get through this bunch in June, do you anticipate much motions practice in July? I mean, motions in limine, I assume there will be some motions in limine, hopefully not too many. But other than that, what is anticipated before the trial?

MS. WOOD: Your Honor, I don't believe that necessarily there would be any motion practice in July other than confidentiality issues with respect to certain Google documents and third parties.

THE COURT: With respect to certain parties.

MS. WOOD: The only other question I would have for the Court is, to the extent that we are now proceeding with a bench trial, whether, for the Court's convenience, whether the Court would want some sort of pretrial briefing, but that not necessarily need be in July.

THE COURT: All right. Well, we're going to talk about that.

The other thing is, I would expect, given the interest of at least litigators and other litigation in this case -- and we've had this issue come up before -- there will probably be some pressure, also from the media, to get access to evidence in this case. So I'm giving both sides a heads-up. The Court does not have the resources to be

publishing all of the exhibits as they come in, and there may be redaction issues as well.

So I want both sides -- and I'm sure your technology support systems are fantastic. But you need to be prepared. The rule we will have in this case is that once an exhibit is admitted into evidence, it's the obligation of the party who moved the exhibit in to make it available on a website that you've set up so that the public can get pretty quick access to it.

We did this in the *Moussaoui* case; it satisfied the media interest. And I think the rule that we had, and it sort of came from the Fourth Circuit, is it had to be posted by early the next morning. So obviously while the case is going on, you know, you're here, but you go back to the office that night and some of your paralegals or whatever will upload so that it's out there so we don't get an issue about access. All right.

In terms of redactions, I am somewhat concerned about that. Now, my understanding is you've agreed to unredact the dollar amounts that we've been talking about.

MS. DUNN: Yes, Your Honor.

THE COURT: I think out of an abundance of caution, when you get our opinion, I'm going to give it to you under seal, and we'll give you a short time period to indicate if there's anything within our opinion that still

bumps into something that is deemed highly confidential. Simply confidential is not going to be enough. All right. But because so much of the material that we've got in this record, and especially the third-party material has sensitivities to it, we're going to need to be careful. So a lot of what we do we'll have to follow that kind of pattern. All right.

And then one of the things to consider in the motions in limine is if there are portions of the trial that are going to have to be held sealed because we're discussing stuff that is under seal. I need those heads-up, because it changes how we, you know, handle the logistics within the courtroom. All right. And there may be protests from the media, which they have a right to raise. So I want to avoid those types of bumps as the case goes along.

I will want -- because this is a complex case, I can tell you right now, I definitely will want proposed findings of fact and conclusions of law before the trial starts, backing it up I would think at least three weeks before the trial. All right.

But, anyway, the reason I asked you about -- the last half of July, I won't be available. So if you're planning, get any hearings done before July 21st or in August, there's a blackout period there. All right.

Again, I want to commend counsel. Your arguments

are great. I'm looking forward to this trial because the quality of the lawyering has been excellent. Just don't start, you know, taking shots at each other. Let's keep this as a good straightforward -- it may be a bit dry, but I would rather it dry than unnecessarily emotional. All right.

We'll recess court for the day.

MS. DUNN: Thank you, Your Honor.

(Proceedings adjourned at 10:58 a.m.)

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR